CABOT SEDGWICK, ET AL.
Contestants

v.

B. H. CALLAHAN,
Contestee

IBLA 71-256 Decided January 31, 1973

Appeal from decision (Arizona Contest No. 4317) of Administrative Law Judge L. K. Luoma declaring invalid for lack of discovery certain lode mining claims located upon lands which were patented under the Stock-Raising Homestead Act of 1916.

Affirmed, as modified.

Mining Claims: Contests--Rules of Practice: Private Contests--Stock-raising Homesteads.

Surface patentees under the Stock-Raising Homestead Act of 1916 have an adverse interest sufficient to bring a private contest against allegedly invalid mining claims which threaten to destroy the value of the surface of their patented lands.

Mining Claims: Discovery: Generally

To constitute a discovery upon a lode mining claim there must be shown to exist within the limits of the claim a lode or vein bearing material which would warrant a prudent man in the expenditure of his labor and means, with a reasonable prospect of success, in developing a mine. It is not sufficient that high mineral values are attached to certain samples where no evidence is presented establishing the quantity of such mineralization and which samples are shown to be in areas of high concentration not representative of the claims.

Mining Claims: Contests--Mining Claims: Discovery: Generally

The burden of proof is on the mining claimant to show by a preponderance of the evidence that the test of discovery has been met.

When in a direct proceeding against a mining claim it is found that no discovery has been made, the claim cannot survive as a valid claim even though the decision determining that no discovery had been made did not specifically so state.

APPEARANCES: May, Dees & Newell, Tucson, Arizona, by Louis W. Barassi, Esq., for the contestants Cabot Sedgewick, et al.; J. B. Klensin, Esq., Tucson, Arizona, for the contestant Arizona Land Title and Trust Company; B. H. Callahan, pro se.

OPINION BY MR. HENRIQUES

B. H. Callahan has appealed from a decision 1/ dated February 19, 1971, of an Administrative Law Judge 2/ holding among other things that a mineral discovery does not exist within the limits of each of his claims. 3/

This proceeding arose in response to contest complaints by the present owners of patented stock raising homestead entries that no valid discovery of valuable mineral deposits exists within the limits of certain unpatented mining claims embracing lands within the patented homestead entries. The mining claimants denied the charges. Thereupon the matter came on for a hearing held October 2, 1969, April 28 and June 29, 1970, in Nogales, Arizona.

1/ The Judge's decision was styled Cabot Sedgewick and Paula Sedgewick. and Arizona Land Title and Trust Company, contestants, v. Elmer E. Johnson and Jane Doe Johnson, contestees, Arizona Contest 4180; and Cabot Sedgewick and Paula Sedgewick, and Arizona Land Title and Trust Company, Contestants, v. Shirley A. Danielson and John Doe Danielson, dba Western Mineral Associates, Elmer E. Johnson and Jane Doe Johnson, Marlyn E. Wissiner and Jane Doe Wissinger, William Glasson and Evangelina Glasson, Gary Garrison and Socorro Garrison, and B. H. Callahan and Jane Doe Callahan, Contestees, Arizona Contest 4317. As none of the contestees other than Callahan has appealed, the decision of the Administrative Law Judge that no valid discovery of a valuable mineral deposit exists on the Circle, Circle No. 1, Hilltop, Hilltop 2, Hilltop 3, Hilltop 4, Silver Slipper, Morning Star, Mary Lou, Gregory Pick, and Little John mining claims has become final.

2/ By order of the Civil Service Commission, the title "Administrative Law Judge" has replaced that of "Hearing Examiner" 37 F.R. 16787 (August 19, 1972).

3/ Cuprite, Cuprite 1, Dura, Uncle Sam, and Honkytonk No. 3, (aka Honkytonk), situated in sections 28, 29,32, 33, T. 23 S., R. 14 E., G & S.R.M., Santa Cruz County, Arizona.

The Judge's decision of February 19, 1971, pointed out that the relationship between the surface owner Contestants and the mineral claimant contestees created under these circumstances raises two threshold questions which must be determined preliminary to any consideration of the merits:

1. Does a surface patentee under the Act have standing to bring a contest challenging the validity of a mining claim located upon the same land?

2. If he does, what relief if any may this Department grant? The Judge then went on to discuss these questions:

STANDING TO BRING CONTEST

The effect of the mineral reservation in the patent is toe segregate the land into two estates–the surface and the mineral. Skeen v. Lynch, 48 F.2d 1044 (10th Cir. 1931), cert. denied. 284 U.S. 633 (1931); Devearl W. Dimond, 62 I.D. 260 (1955). Under the terms of the Act the mineral estate is subject to location and entry under the general mining laws [30 U.S.C. §§ 21 et seq. (1970)] in the same manner as are vacant, unappropriated public lands, 43 CFR 3814.1(e), with the exception that the surface owner is entitled to compensation for any damages resulting from exploration or mining. The Act specifically provides that a mining claimant:

> . . . shall have the right at all times to enter upon the lands . . . patented . . . for the purpose of prospecting for . . . mineral therein, provided he shall not injure, damage, or destroy the permanent improvements of the . . . patentee, and shall be liable to and shall compensate the . . . patentee for all damages to the crops on such lands by reason of such prospecting. Any person who has acquired from the United States the . . . mineral deposits in any such land, or the right to mine and remove the same, may reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining or removal of the . . .

> minerals, first, upon securing the written consent or waiver of the homestead . . . patentee; second, upon payment of the damages to crops or other tangible improvements to the owner thereof, where agreement may be had as to the amount thereof; or, third, in lieu of either of the foregoing provisions, upon the execution of a good and sufficient bond or undertaking to the United States for the use and benefit of the . . . owner of the land, to secure the payment of such damages to the crops or tangible improvements of the . . . owner as may be determined and fixed in an action brought upon the bond or undertaking in a court of competent jurisdiction against the principal and sureties thereon . . .

The protection afforded the surface owner by this section was further broadened by Section 2 of the Act of June 17, 1949 (63 Stat. 201) and Section 5 of the Act of June 21, 1949 (63 Stat. 215), codified in 30 U.S.C. Sec. 54 (1964), which reads in pertinent part:

> Notwithstanding the provisions of any Act of Congress to the contrary, any person who hereafter prospects for, mines, or removes by strip or open pit mining methods, any minerals, from any land included in a stock raising or other homestead entry or patent, and who had been liable under such an existing Act only for damages caused thereby to the crops or improvements of the entryment or patentee, shall also be liable for any damage that may be caused to the value of the land for grazing by such prospecting for, mining, or removal of minerals . . .

In the cases under consideration here the mining claimants contend that they lawfully entered the lands and located valid mining claims on the mineral estate reserved to the United States. Since Contestants have

no claim to the mineral estate, the question arises as to whether they are adverse parties with standing to bring these contests under the Departmental rules of practice. The governing regulation is Section 1852.1-1 of the Code of Federal Regulations [now 43 CFR 4.450-1], which reads in pertinent part:

> Any person who claims title to or an interest in land adverse to any other person claiming title to or an interest in such land . . . may initiate proceedings to have the claim of title or interest adverse to his claim invalidated for any reason not shown by the records of the Bureau of Land Management. Such a proceeding will constitute a private contest and will be governed by the regulations in the subpart.

The same question was raised and decided in a decision of the Director, Bureau of Land Management, dated October 7, 1957, captioned as Earl G. Davis v. Edith Mohamed, Arizona Contest No. 10000, and Joseph A. Birchett v. Edith Mohamed, Arizona Contest No. 10001. No appeal was taken and the decision became a final Departmental decision. The regulation in effect at that time [43 CFR 221.51] contained the same language as quoted above, and was construed by the Director as follows:

> . . . Since minerals are reserved and the surface has been patented, a mining claimant would get only minerals and not title to the surface as such; it can be said in a technical sense that the surface claimants are not claiming title adverse to the title of the mineral claimant. However, the above provision is broader than that: it refers to title or interest adverse to title or interest of another. Section 9 of the Stock Raising Homestead Act [43 U.S.C., Sec. 299] gives the owner of the minerals the right to reenter and occupy as much of the surface as is reasonably necessary for his mining operation. Each of the contestants has alleged that the mining claims could

> effectively destroy the surface value of the land. The surface patentees do have an adverse interest sufficient to bring contest against allegedly invalid mining claims which threaten to destroy the value of the surface . . .
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> It is concluded that the surface patentees are qualified to bring mineral contests against mining locations of the reserved minerals.

In reaching this conclusion the Director relied on Turf Paradise, Inc., v. Robert R. Adams, Contest No. 9945, Arizona 080536 (September 9, 1955), which was an earlier BLM Director's decision approved by the Assistant Secretary of the Interior. That decision came about as the result of a private contest filed against a mining claimant by the lessee of the surface owner, the State of Arizona, which acquired its surface patent under Section 8 of the Taylor Grazing Act (43 U.S.C., Sec. 315g). It held the mining claim to be null and void on purely procedural grounds.

A similar question concerning the same regulation was considered by the Ninth Circuit Court of Appeals in the Case of Duguid v. Best, 291 F.2d 235 (1961), cert. denied, 372 U.S. 906 (1963). In that case the contestant was the holder of a special use permit granted by the United States Forest Service to construct a dam and spillway on national forest lands, a portion of which encroached upon the contestee's existing unpatented mining claim. The contestee, acknowledging that the Bureau of Land Management had power to initiate action to challenge the validity of his claim, contended that such power could not be vested in a private party. Rejecting that argument, the Court said:

> Under Section 221.51 [now 43 CFR 4.450-1] a person who claims title to or interest in public lands adverse to any other person claiming title to or interest in such land 'may initiate proceedings to have the claim of title or interest to his claim invalidated for any reason not shown by the records of the Bureau of Land Management.' [Underlining added]. By the express language of the regulation, a person

> who initiates such proceedings seeks only to have invalidated the claim of title or interest of the adversary party against the government. The adjudication is made not by the person who initiates the proceedings, but by authorized representatives of the United States. Under such regulation there is no transfer of the mantle of sovereignty from the shoulders of the government to those of a private person. We regard the private contest proceedings as a means or method which is designed to assist the Secretary of the Interior in carrying out his duties to protect the interest of the government and the public in public lands, in that by such method there may be called to the attention of the Bureau of Land Management invalid claims to title or interest in public lands, the invalidity of which does not appear on the records of the Bureau of Land Management and of which the Bureau may be without knowledge. If a claim of title to or interest in public land may be invalidated in a proceedings initiated by the government we are unable to see why the same result may not be reached in a proceedings initiated by a private person.
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> Since the purpose and end result of a private contest operate to protect the government against invalid claims of title to or interest in public lands, we are convinced that such regulation is valid . . .

See also Paradise Irrigation District v. James Duguid and Bertha V. Duguid, 71 I.D. 442 (1964).

The most compelling argument in support of the position that the surface owner under the Act has standing to bring a contest against a mining claimant can be made from the language of the Act itself. As set forth above, the Act makes a distinction between the mineral prospector and the claimant who has actually made a discovery of minerals. With respect to the mere prospector, the surface owner is stated to have the right to compensation for damages to the surface resources caused by prospecting activities. On the other hand, the claimant who has actually acquired

title to a mineral deposit from the United States, either by patent or a showing that he has perfected a discovery of a valuable mineral deposit as contemplated by the general mining laws, Mohamed, supra, may reenter and conduct mining activities only upon:

1. Securing the written consent of the surface owner; or
2. Agreement as to the amount of damages to the surface; or
3. Execution of a sufficient bond for the benefit of the surface owner to secure payment of such damages.

Since the Department of the Interior is the proper tribunal to determine whether a valid discovery has been perfected in an unpatented mining claim, Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963), the surface owner is entitled to bring an action in the Department for that purpose, so that he may know the proper course to follow in protecting his surface estate. Branch v. Brittan, et al., 50 L.D. 510 (1924).

Accordingly, it is concluded that the Contestants have standing to bring these contests to determine whether valid discoveries have been perfected on the mining claims.

We agree with the conclusions of the Judge.

We may now examine the question of whether there was a discovery of a valuable mineral deposit on any of the claims. Patents issued under the Stock-Raising Homestead Act of 1916, 39 Stat. 862, 43 U.S.C. §§ 291-301 (1970), contain a reservation to the United States of all minerals, together with the right to prospect for, mine, and remove the same. The Act specifically provides that the "* * * mineral deposits in such lands shall be subject to disposal by the United States in accordance with the provision of the * * * mineral land laws in force at the time of such disposal."

The mineral estate reserved to the United States in a patent issued under the Stock-Raising Homestead Act, supra, is open to exploration and entry under the United States Mining Laws, 30 U.S.C. §§ 21, et seq. (1970). A valid location of a lode mining claim requires discovery of a valuable mineral deposit within the limits

of the claim. 30 U.S.C. § 23 (1970). It is well established that a valid mineral discovery only occurs:

> ". . . [w]here minerals have been found and evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, . . .

Castle v. Womble, 19 L.D. 455, 457 (1894); United States v. Coleman, 390 U.S. 599 (1968); Chrisman v. Miller 197 U.S. 313 (1905).

Additionally, the Department has held that to constitute discovery upon a lode mining claim, the following elements are necessary:

1. There must be a vein or lode of quartz or other rock in place.
2. The quartz or other rock in place must carry gold or some other mineral deposit.
3. The two preceeding elements, when taken together, must be such as to warrant a prudent man in the expenditure of his time and money in the effort to develop a valuable mine. Jefferson-Montana Copper Mines Company, 41 L.D. 320 (1912); United States v. Lillibridge, et al., 4 F. Supp. 204 (S.D. Cal. 1932).

It is not enough that the mineral values exposed might justify further prospecting or exploration to determine whether actual mining operations would be warranted. United States v. Henault Mining Company, 73 I.D. 184 (1966), aff'd, Henault Mining Company v. Tysk, et al., 419 F.2d 766 (9th Cir. 1969) cert. denied 398 U.S. 950 (1970).

It is well settled that the Department of the Interior has been grantedplenary powers in the administration of the public lands. United States v. Ford M. Converse, 72 I.D. 141 (1965), aff'd. sub nom. Ford M. Converse v. Stewart L. Udall, 399 F.2d 616 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969). Reserved minerals within lands patented under the Stock-Raising Homestead Act fall within the general category of public lands and resources under the administration of the Department of the Interior.

In its administration of the public lands and their resources, the Department of the Interior has long adhered to the position that if no discovery within the meaning the mining laws has been made within the limits of a contested mining claim, such claim is null and void. United States v. Carlile, 67 I.D. 417 (1960); United States

v. Baranoff Exploration and Development Company, 72 I.D. 212 (1965). Cf. United States v. William J. Bartels, Sr., et al., 6 IBLA 124 (1972).

When adversary proceedings are brought against a mining claim, the contestant has the burden of establishing a prima facie case that no discovery of a valuable mineral deposit has been made. When such a prima facie case is established by the contestant, the burden then shifts to the mineral claimant to show by a preponderance of the evidence that a discovery has been made within the limits of each contested claim. Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959).

What is shown concerning the mineral values present in the appellant's claims in the record established at the hearing? Let us look at the Judge's resume in his decision:

> With respect to the Dura claim Mr. [Donlon] LoBiondo [vice president and chief geologist of Holt Incorporated, Tucson, Arizona, a consulting geological firm] described the main working as being an adit 200 feet long, with several inaccessible cobbed cuts, two small stopes, and a fifty-foot winze (Tr. 111). In these workings he visually observed the mineralization in the vein and cut two samples of the vein material. These samples were assayed and were found to contain values from $3.00 to $4.00 in gold, silver and lead per ton (Tr. 112-113). The underground workings in the Uncle Sam claim were considered unsafe to enter so he merely examined the surface outcroppings. These, in his opinion, did not merit sampling (Tr. 113). He saw a few small workings on the Cuprite and Cuprite No. 1 claims, saw no workings on the Honkytonk No. 3, and cut no samples because the veins were very limited and the mineralization appeared to be very weak. (Tr. 113-114, 119).
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> With respect to the two Cuprite claims, Mr. LoBiondo expressed the opinion that a person of ordinary prudence would not be justified in making expenditures with a reasonable prospect of success in developing a valuable mine (Tr. 119). With respect to the Dura, Uncle Sam and Honkytonk No. 3 claims, he expressed the same opinion stating:
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> > . . . I could not recommend that much in the way of 9 expenditure or much in the way of hope could be expected from any exploration on the

> property. Most of the mineralization, the higher grade mineralization occurs in small pods. These are difficult to prospect for, and they are expensive to find. The pods are a matter of a few feet in length or diameter, or a matter of a few tons, it appears from my examination with the claim owners, and from what I have seen. And even though there are these pods of high grade, the cost of finding them and then mining them in conjunction with all the other mining that would have to go on to reach them would make them prohibitively expensive to mine and explore for (Tr. 114).

In testifying about his activities and future plans for these claims, Contestee Callahan said:

> Well, in the first place, the claims that I have out there are legally claims, they are recorded, and I have not staked those claims with the idea of actual mining, I have staked those claims for developing them up to a point where I could sell them to a regular mining outfit, people with the knowledge and money to carry them on. In other words, they are under a development stage. At the present time, I have two parties in Nevada interested in the claims. They have had their geologists down there. They are satisfied with the deal. And this procedure we have had going on here for the last six months have held them off, because they don't want to be buying into a lawsuit, or anything like that. And as far as actually mining them myself, I do not have any money to do it. But I am merely developing the claims and proving them up to the point where they can be mined.
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> I have sold a small amount of ore, specimens, and everything. And I have got better than five hundred dollars' worth of ore that I am not selling because of waiting later in the year when the silver price goes back up again. And that is ore that I have taken out during the stages of development. (Tr. 214).

* * *

Q. . . . how long have you been working on those properties?

A. Well, I started out with one property six years ago, and then I have added to it as I go along.

Q. How much ore do you think you have extracted during this time?

A. Oh, actually, I would say in the neighborhood of twenty tons, all told. And that was just ore I took out while I was trying to make a showing. I didn't take it out for commercial reasons, or anything . . . (Tr. 223-224).

* * *

A. The only thing I have sold is, like we will get specimen gold, and stuff like that, we sell that. In other words, more to rock hounds. But as far as shipping in bulk, no, I have not (Tr. 226).

Mr. Callahan cut a sample from each of the claims and had them assayed in Mexico for gold, silver and lead. The assay return [as evaluated by LoBiondo] (Ex. E-12) shows values of (1) Cuprite - $8.39 per ton, (2) Cuprite 1 - $3.95 per ton, (3) Dura - $49.33 per ton, (4) Uncle Sam - $42.06 per ton, and (5) Honkytonk No. 3 - $33.97 per ton. Mr. Callahan stated that all the samples were cut across the face of a vein along with some of the waste material (Tr. 220). He also said that they were cut across the areas which he felt were the hot spots (Tr. 223). In addition to the above, Mr. Callahan introduced nine other assay reports (Exs. C-2 through C-10) representing samples taken from the Dura claim (two may have come from the Uncle Sam - Tr. 217). Some of these were taken by Mr. Callahan and assayed in Mexico and others were taken by people who were interested in the property (Tr. 215-219). The values shown, as calculated by Mr. LoBiondo (Exs. E-3 through E-11), range from $2.87 to $109.18 per ton, excluding one concentrate which ran $117.76, or an Aithmetical average of $43.15. From the evidence presented it is not possible to relate these values with any degree of certainty to mineable material in place.

The Judge summarized the evidence as showing the claims are onground containing some values of gold, silver and lead, but that the demonstrated values are not such as to constitute discovery as it is contemplated by the mining laws. He stated that if one could accept mining and marketing costs of between $15 and $20 per ton, and also could assume the values of the contestee's samples as being truly representative of mineable rock in place, then it could only be concluded that a person of ordinary prudence would be justified in spending time and money in performing mining operations on the claims. But the Judge announced that he could not make such a conclusion for these reasons:

1. Most of the sampling done personally by Contestee was from vein material, usually isolated hot spots, the results of which cannot be equated to values of mineable rock in place.

2. Most of those samples were assayed by a person in Mexico with no foundation laid as to his qualifications.

3. Many of Contestee's assay reports were the result of sampling done by other parties who were not available for cross-examination to determine how the sampling was performed.

4. The sampling by Mr. LoBiondo (a qualified mining engineer and well experienced in evaluating mining properties), reveals the values to be well below the minimum of $15 per ton break-even point. Moreover, his general examination of the vein structures and critique of Contestee's sampling methods support the conclusion that the value of the rock in place falls far below the values shown by Contestee's assay reports.

5. The fact that no ore has been sold from the claims. 4/

4/ This reason, standing alone, would not support the Judge's conclusion. The Department has repeatedly stated that it required a showing that minerals could have been extracted, mined and removed at a profit, not that actual sales must be demonstrated. Cf. e.g., United States v. C. B. Myers et al., 74 I.D. 388 (1967). But this is not to say that the Judge, as trier of fact, could not assign some weight to this reason in his overall analysis of the case.

He determined that no discovery of a valuable mineral deposit presently exists within or on the Cuprite, Cuprite 1, Dura, Uncle Sam and Honkytonk No. 3 mining claims.

The appellant contends that mines on his claims have produced and still are capable of producing commercial grade ore and that the claims are in the development stage. He requests a hearing to present evidence in support of his contentions.

Although the mineral values reflected on certificates of assay submitted at the hearing were not unsubstantial, the evidence established that the assay samples were not truly representative and had, instead, been cut from better than average mineralized locations.

Dilution of the values suggested by the assay certificates through costs of mining, milling and smelting would make questionable an assertion that a prudent man would expend his time and money in anticipation of developing a paying mine on these claims.

Accordingly, we agree with the Judge's conclusion that discoveries of valuable mineral deposits have not been shown to exist within the limits of any of the contested claims.

Having found that a discovery of a valuable mineral deposit does not exist within the limits of any of the claims, the Judge stated that he would not extend his authority beyond such finding, that is, he would not declare them null and void. We do not agree with the position expressed by the Judge that the subject mining claims should not be declared null and void. The following comment from Carlile, supra, is illuminating:

> What is the effect of a declaration of invalidity? It is that the mining claimant has acquired no rights against the United States; he has no exclusive right of possession to the land in his claim which is property in the fullest sense of the word. If the United States wishes to withdraw the land in the invalidated claim or otherwise dispose of it under the public land laws, it can do so. If the land has already been included in a withdrawal or some other form of disposition, the withdrawal will attach to the land or the prior

> disposal will remain unimpaired. * No further notice to the claimant or further proceedings against the claim are necessary to achieve these results.
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> If, however, at the time of invalidation of the claim for lack of discovery the land has not been withdrawn or otherwise disposed of, the claimant may resume occupation of the land, or remain in occupation, and so long as he is engaged in persistent and diligent prosecution of work looking to a discovery have pedis possessio. But until he makes a discovery, he had no rights against the United States and the United States can withdraw or otherwise dispose of the land without giving him further notice. In other words, he has the same status as anyone seeking to make a mining location on land open to mining.

The sine qua non of a valid mining claim is a discovery of a valuable mineral deposit. Therefore, the contested claims are null and void, and the Judge's decision is modified to that extent.

The record made at a hearing in a contest proceeding before this Department must be the sole basis for decision under the Department's rules of practice; therefore, assertions submitted on appeal of an evidentiary nature may be considered only to determine if there should be a new hearing. United States v. Arch Little and Ethelyn Little, A-30842 (February 21, 1968). The exhibits accompanying the appeal do not persuade that a different conclusion would have been reached by the Judge if they had been presented, as they might have been, at the hearing. We do not see any reason for further hearing in this matter.

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* In the Cameron case, the land in the mining claim was, subsequent to its location, included in the Grand Canyon National Monument. The withdrawal for the monument saved from the withdrawal any valid mining claims theretofore acquired. The Court sustained the Secretary's ruling that upon the invalidation of the mining claim the land became part of the monument as though the location had not been attempted.

67 I.D. at 422, 423.

It appears that some or all of the mining claimants named in the original complaints, acting in accordance with Section 9, Stock-Raising Homestead Act, supra, presented a bond or bonds in the sum of $1,000 to the surface owners in connection with the mining claims involved in this preceeding. The surface owners apparently considered the amount of the bonds inadequate in the circumstances. The Department's regulations, 43 CFR 3814.1(d), provide that the Land Office Manager will determine the adequacy of such bonds, allowing the surface owners the right of appeal if they disagree with his finding. The record before us is silent as to any action by the manager on these bonds. However, in light of the holding by the Administrative Law Judge that the mining claims involved in these proceedings do not have a discovery of valuable mineral deposits, it is premature for the mining prospectors to submit any bonds in accordance with the Act.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed, as modified.

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Douglas E. Henriques, Member

We concur:

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Martin Ritvo, Member

I dissent in part:

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Fredrick Fishman, Menber

Separate views of Frederick Fishman.

I agree with the conclusion that a surface owner of land, patented under the Stock-Raising Homestead Act, as amended, 43 U.S.C. §§ 291-301 (1970), has standing to contest a mining claim on that land.

It is true, however, that 43 U.S.C. § 299 (1970) attempts to provide remedies for the surface owner from damages to the surface caused by a mining claim:

* * * *

> Any person qualified to locate and enter the coal or other mineral deposits, or having the right to mine and remove the same under the laws of the United States, shall have the right at all times to enter upon the lands entered or patented, as provided by said sections, for the purpose of prospecting for coal or other mineral therein, provided he shall not injure, damage, or destroy the permanent improvements of the entryman or patentee, and shall be liable to and shall compensate the entryman or patentee for all damages to the crops on such lands by reason of such prospecting. Any person who has acquired from the United States the coal or other mineral deposits in any such land, or the right to mine and remove the same, may reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining or removal of the coal or other minerals, first, upon securing the written consent or waiver of the homestead entryman or patentee; second, upon payment of the damages to crops or other tangible improvements to the owner thereof, where agreement may be had as to the amount thereof; or, third, in lieu of either of the foregoing provisions, upon the execution of a good and sufficient bond or undertaking to the United States for the use and benefit of the entryman or owner of the land, to secure the payment of such damages to the crops or tangible improvements of the entryman or owner, as may be determined and fixed in an action brought upon the bond or undertaking in a court of competent jurisdiction against the principal and sureties thereon, such bond or undertaking to be in form and in accordance with rules and regulations prescribed by the Secretary of the Interior and to be filed with and

> approved by the officer designated by the Secretary of the Interior of the local land office of the district wherein the land is situate, subject to appeal to the Secretary of the Interior or such officer as he may designate * * *. [Emphasis supplied.]

At first blush, it might appear that any improvements of the surface owner, damaged by mining operations, would be the subject of compensation. Kinney &c. Oil Co. v. Kieffer, 277 U.S. 488, 505, 507-508 (1927), which relates to minerals reserved under the Act of July 17, 1914, 30 U.S.C. §§ 121-124 (1970), containing similar language (30 U.S.C. § 122) to that quoted above, puts the term "improvements" into focus:

> * * * In the homestead patent these rights are distinctly excepted and reserved from the estate thereby granted. Their exercise involves no taking of anything granted by the patent. Nor is the one who under the patent owns the surface, with those rights reserved, entitled to compensation for the minerals taken or the use made of the surface. The only compensation which he rightfully may demand is, as the act of 1914 says, for "damages caused" by the mining operations. The sentence next preceeding (sic) that in which these words occur makes it fairly plain that they refer to damages to "crops and improvements," and the title to the act, coupled with the reference to "crops" shows that "agricultural" improvements are the kind intended. Certainly it is not intended to include improvements placed on the land, after the mining operations are under way, for purposes plainly incompatible with the right to proceed with those operations until the oil and gas are exhausted. It well may be that, if the operations are negligently conducted and damage is done thereby to the surface estate, there will be liability therefor. But such liability will ensue, not from admissible mining operations and use of the surface, but from the inadmissible negligence causing the damage.
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> So, while the provision on which the decision of the circuit court of appeals rests cannot be held to be an obstacle to the maintenance of this suit in a

> court of equity, we think it shows a need for modifying the decree of the district court by providing therein for an ascertainment in this suit of any damages which the plaintiffs' entry and operations under the lease may have caused to the agricultural improvements or crops of the owner of the surface estate, and also by conditioning the relief awarded the plaintiffs upon their giving a good and sufficient bond or undertaking to pay such damages within a limited time after the same are ascertained. [Emphasis supplied.]

Thus the dictum in Kinney, together with the Act of June 21, 1949, 30 U.S.C. § 54 (1970), limit recovery of damages for crops, agricultural improvements, and grazing value of land 1/. Therefore, the law apparently makes no provision for compensation for damages to non-agricultural improvements caused by mining operations. In those circumstances, it is particularly proper to hold that a surface owner has standing to bring a contest against a mining claimant; as a " * * * person who claims title to or an interest in land * * *." 43 CFR 4.450-1.

1/ This view is buttressed by H. Rept. 1589, 87th Cong., 2d Sess. (1962), p. 6 concerning H.R. 10566, a bill "Providing for the withdrawal and orderly disposition of mineral interests in certain public lands in Pima County, Arizona, which report embodies the letter from Assistant Secretary John A. Carver, Jr., dated July 20, 1961, which states as follows:

"It is believed that additional protection against surface damages than is afforded by existing law should be provided for the urban area lands in these situations where the nonleasable minerals are not transferred to the surface owner. The liability of a mineral locator on lands patented under the Stock-Raising Homestead Act, supra, is limited to '* * * damages to crops or tangible improvements of the entryman or owner. * * *' This provision is supplemented by the act of June 17, 1949 (62 Stat. 201; 30 U.S.C. 54), to provide certain additional surface damage protection for grazing lands. These laws, however, were obviously designed to provide relief where the lands are being used for agricultural or grazing purposes and are not suitably tailored for urban area lands."

While concededly the evidence adduced at the hearing did not warrant a finding of discovery, it is clear, nevertheless, that substantial mineral values were present, albeit as isolated pods. However, the showings do positively indicate the possibility of substantial ore bodies.

I fully agree with Judge Luoma that no useful purpose is served by declaring the claims null and void and that such a declaration is inappropriate in this case.

The main opinion proceeds to declare the claims null and void on the basis of United States v. Carlile, 67 I.D. 417 (1960). Carlile holds that if in a contest proceeding it is found that a discovery of valuable mineral has not been made, the claim must be declared null and void.

I do not agree with the doctrine enunciated in Carlile, which controls the main opinion.

Carlile holds that there is no reasonable or logical basis for the Department's practice in some mining contests involving applications for patent to reject the application for lack of discovery on the claim and to permit the claim to remain in existence. Carlile has also been construed to require a declaration of invalidity of a mining claim where a lack of discovery is established in a contest hearing. United States v. William J. Bartels, Sr., et al., 6 IBLA 124 (1972).

My views that the Carlile doctrine is erroneous are set forth in my dissent in Bartels. The Judge's decision in the case at bar is sound and I would affirm it.

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Frederick Fishman